

14-7955 GLOSSIP V. GROSS

DECISION BELOW: 2015 WL 137627

LOWER COURT CASE NUMBER: 14-6244

QUESTION PRESENTED:

In *Baze v. Rees*, 553 U.S. 35 (2008), the Court held that Kentucky's three--drug execution protocol was constitutional based on the uncontested fact that "proper administration of the first drug"-which was a "fast-acting barbiturate" that created "a deep, comalike unconsciousness"-will ensure that the prisoner will not experience the known pain of suffering from the administration of the second and third drugs, pancuronium bromide and potassium chloride. *Id.* at 44.

The *Baze* plurality established a stay standard to prevent unwarranted last--minute litigation challenging lethal-injection protocols that were substantially similar to the one reviewed in *Baze*; a stay would not be granted absent a showing of a "demonstrated risk of severe pain" that was "substantial when compared to the known and available alternatives." *Id.* at 61.

In this case, Oklahoma intends to execute Petitioners using a three-drug protocol with the same second and third drugs addressed in *Baze*. However, the first drug to be administered (midazolam) is not a fast-acting barbiturate; it is a benzodiazepine that has no pain-relieving properties, and there is a well-established scientific consensus that it cannot maintain a deep, comalike unconsciousness. For these reasons, it is uncontested that midazolam is not approved by the FDA for use as general anesthesia and is never used as the sole anesthetic for painful surgical procedures.

Although Oklahoma admits that administration of the second or third drug to a conscious prisoner would cause intense and needless pain and suffering, it has selected midazolam because of availability rather than to create a more humane execution. Oklahoma's intention to use midazolam to execute the Petitioners raises the following questions, left unanswered by this Court in *Baze*:

Question 1: Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, comalike unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious.

Question 2: Does the *Baze*-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in *Baze*?

Question 3: Must a prisoner establish the availability of an alternative drug formula even if the state's lethal-injection protocol, as properly administered, will violate the Eighth Amendment?